NO. 50057-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant,

v.

WAREHOUSE DEMO SERVICES, INC,

Respondent.

BRIEF OF RESPONDENT

EISENHOWER CARLSON PLLC
Attorneys for Respondent

Garry G Fujita, WSBA #8811
EISENHOWER CARLSON PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, Washington 98402
gfujita@eisenhowerlaw.com
Telephone: (253) 572-4500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This appeal presents two legal questions. Did the Board of Tax Appeals ("BTA") and the superior court correctly interpreted RCW 82.04.290(2)(b)? If so, were there sufficient facts supporting the BTA's findings that the Respondent, Warehouse Demo Services, Inc. ("Warehouse Demo"), met the statutory requirements of RCW 82.04.290(2)(b)?

During the relevant period, Warehouse Demo demonstrated vendor products at Costco and the question for this court is whether the vendor's repayment to Warehouse Demo for the cost for the samples should be taxable to Warehouse Demo. Warehouse Demo will explain that the BTA and superior court reached the correct legal interpretation. It will then explain that there is more than ample evidence to support the BTA's findings of fact that Warehouse Demo functioned as agent under the statute.

Warehouse Demo, the BTA and the superior court interpreted the RCW 82.04.290(2)(b) to mean that the product vendors' method to "furnish" samples to Warehouse Demo included the parties' chosen repayment method. Their rulings found irrelevant whether the method was to arrange (a) for Warehouse Demo's purchase and the product vendor's repayment of the samples' cost or (b) for delivery of the samples

in-kind. In either situation, the value of the samples does not fall within the scope of the taxing statute.

The Appellant, Department of Revenue ("Department"), disagrees, narrowly reading the statute to mean that *only* if the product vendor furnishes Warehouse Demo with the in-kind samples, then the sample values are excluded from taxation. It rejects that "furnishing" includes an arrangement when the vendors agree to repay Warehouse Demo for the cost of the samples used to demonstrate the vendors' products.

In both situations, a demonstrator's business activities are identical; they demonstrate the vendors' products. But, the Department's interpretation creates different tax burdens on that single business activity that frustrates the statute's purpose and spirit. It does so by treating differently the way in which the product vendor furnishes the product samples. For example, according to the Department, if Warehouse Demo buys the samples from Costco and then the vendors subsequently repays Warehouse Demo for the cost, then Warehouse Demo is denied the exclusion. However, if the product vendors provide the product samples in-kind to Warehouse Demo (or repurchase the product (that they initially sold to Costco) from Costco and provide the product samples in-kind to Warehouse Demo), then Warehouse Demo is allowed the exclusion from

taxation. The BTA and the superior court found these subtleties to be distinctions without a legal difference.

This court might wonder the purpose of the statute. There is no evidence in the statute that expressly explains why the exclusion exists. One could speculate that it makes no economic sense to include the value of the samples as a gross receipt, because the demonstrator was not reselling the samples at a profit. Taxing the value of the samples would likely reduce the demonstrator's profit margins, making it difficult for them to do business profitably.

This court might also wonder what the tax policy might be for (a) excluding the value of samples from the measure of the tax when the samples are provided in-kind through shipment or directly purchased from Costco but (b) including cash repayments for the samples in the measure of the tax on the activity of demonstrating products. Again, the statute does not express a policy, but one could speculate that when the taxpayer is merely demonstrating the vendors' products, the taxpayer should not pay a gross receipts tax on the value of the sample products given away for free. And if that is the spirit of the statute, then it would make no sense to tax demonstrators differently based on the way in which the samples were obtained.

Finally, the court might ask why the legislature would choose winners and losers based on the subtle distinction between providing samples in-kind and providing a repayment arrangement to obtain the vendors' samples. Warehouse Demo does not think the statute was intended to pick winners and losers and that all demonstrators should be taxed alike.

Neither the BTA nor the superior court agreed with the Department. And Warehouse Demo does not believe the Department's construction is consistent with the statute's spirit. For the reasons that follow, the BTA and the superior court correctly interpreted the statute and this court should, like the superior court, affirm the BTA decision.

II. RESTATEMENT OF THE ISSUES

1. Did the BTA err when it concluded that it did not legally matter whether the product vendors furnished sample products in-kind or through an arrangement between Costco and the product vendors that permitted Warehouse Demo to purchase the products from Costco, because under either method, the samples were "furnished" under RCW 82.04.290(2)(b)?

2. Did the BTA err when it found sufficient evidence that Warehouse Demo acted as the product vendors' agent?

3. If this court disagrees with the BTA that the statute is unambiguous, does the legislative history support the BTA's conclusion that the product samples were "furnished" to Warehouse Demo?

III. COUNTER STATEMENT OF THE CASE

Warehouse Demo does not dispute the Department's description of the procedural aspects of this matter. Br. of Appellant at 4-11.

Substantively, Washington Demo demonstrated food products at Costco, pursuant to an agreement. It charged a fee for its demonstration services; however, the fee did not include the cost of the sample products. Tr. at 36. Costco did not provide the product samples; the product samples came from the product vendors. Tr. at 36-37. These product vendors included sellers like Tysons, Nestle and General Mills. Tr. at 23. The product vendors furnished Warehouse Demo with samples through a process that involved Costco providing Warehouse Demo with an "in-house" HSBC credit card. Tr. at 28. Warehouse Demo used this credit card (instead of a credit card from another source) to procure the necessary samples. *Id.* Under the agreement, Warehouse Demo could not remove the card from the premises; the HSBC credit card was kept in a Costco vault. AR 272 (Section 10.C.) Warehouse Demo was then repaid by the product vendors for the cost of the samples used in the demonstrations. Tr. at 37 and 40-41; AR 015 (FOF 9). Warehouse Demo, the BTA (AR

019 (FOF 13)) and the superior court (VRP at 31) agreed that this procurement method was "furnishing" samples under RCW 82.04.290(2)(b). The Department disagrees, narrowly reading "furnish" to exclude cash payments.

The BTA considered both testimony and exhibits, concluding that the product vendors furnished the product samples to Warehouse Demo as their agents. Tr. at 012. Warehouse Demo stated that it was not an agent for purposes of Rule 111[1]; it did not say it was not agent for purposes of RCW 82.04.290(2)(b)[2]. The record supports that Warehouse Demo was their agent for purposes of RCW 82.04.290(2)(b). Testimonials from the product vendors confirm that Warehouse Demo successfully marketed their products on their behalf. AR 623-634. Although the Costco agreement between Warehouse Demo and Costco expressly disclaimed agency, the agreement did confirm that Warehouse Demo acted on behalf of the product vendors. AR 146. Both the BTA and the superior court found that these facts supported the legal conclusion that Warehouse Demo was the product vendors' agent for purposes of RCW 82.04.290(2)(b). AR 020 (COL 14.3) and VRP at 34. The Department

---

[1] WAC 458-20-111

[2] On April 30, 2013, Warehouse Demo stated in its administrative appeal: "First, WDS is not an agent of, nor do they have a contract with, the product vendors, thus an agency/Rule 111 analysis is not warranted." AR 579.

disagrees because Warehouse Demo stated that it was an agent for purposes of Rule 111 and there were no agreements that established the principal agency relationship.

For the reasons that follow, this court should affirm the BTA and Superior Court.

IV. ARGUMENT

a. Standard of Review

The Department accurately describes the standard of review. Br. of Appellant at 11. The Department clearly has the burden to show that the BTA erred. However, in addition to what the Department has described, the Washington Supreme Court has also explained:

> … Where statutory language is plain and unambiguous courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency. *Bravo v. Dolsen Cos.,* 125 Wash.2d 745, 752, 888 P.2d 147 (1995); *Wash. Fed'n of State Employees v. State Pers. Bd.,* 54 Wash.App. 305, 309, 773 P.2d 421 (1989). A statute is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous **1229 merely because different interpretations are conceivable." *State v. Hahn,* 83 Wash.App. 825, 831, 924 P.2d 392 (1996). Finally, we take note that "[i]f any doubt exists as to the meaning of a *397 taxation statute, the statute must be construed most strongly against the taxing

> power and in favor of the taxpayer." *Ski Acres, Inc. v. Kittitas County,* 118 Wash.2d 852, 857, 827 P.2d 1000 (1992).

Agrilink Foods, Inc. v. State, Dep't of Revenue, 153 Wn.2d 392, 396–97, 103 P.3d 1226, 1228–29 (2005). The court should be mindful of these standards as well as it reviews the parties' arguments.

b. The Statute Is Plain on Its Face and It Applies When the Product Vendor Furnished the Product Samples.

i. Relevant Factual Background Related to Whether the Product Vendors Furnished Product Samples to Warehouse Demo.

The question is whether the statute is clear on its face. The operative portion of the statute provides:

> The value of advertising, demonstration, and promotional supplies and materials *furnished to an agent* by his or her principal or supplier to be used for informational, educational, and promotional purposes is not considered a part of the agent's remuneration or commission and is not subject to taxation under this section.

RCW 82.04.290(2)(b). (Italics supplied.)

As Warehouse Demo explained to the BTA, it was paid to provide the labor of demonstrating products. Tr. at 19. As part of its activities, Warehouse Demo set up and used product displays in Costco shopping aisles, distributed free product samples and written materials to Costco shoppers, and answered the shoppers' questions about the products. *See generally* Tr. 19-29; AR 026 (FOF 6). Product demonstrators prepared for

demonstrations by heating food, if necessary, and dividing food products into sample-sized portions. AR 576; AR 027 (FOF 6.2). The written materials that Warehouse Demo demonstrators distributed to shoppers typically included signs, pictures, nutritional information, and other product information. AR 576; AR 026–027 (FOF 6.1). Warehouse Demo's customers provided these materials to Warehouse Demo at no charge. AR 576; AR 027 (FOF 6.1). According to the agreement with Costco ("Demo Agreement") (AR 146-154), Warehouse Demo performed the demonstrations "on behalf of Vendors" under Section 1.C.of the Demo Agreement. AR 146.

Costco did not provide the products under Section 10.C. of the Demo Agreement. AR 150. The product vendors did not ship samples to Warehouse Demo. For various business reasons, the parties arranged for Warehouse Demo to use the Costco's in-house HSBC credit card to purchase the sample products. Tr. at 28. The business reasons were primarily logistics. The product was already located at the Costco premises. AR 647. This would logically eliminate the product vendors' cost burden of shipping product to Warehouse Demo when the products were already located on site. Additionally, the Costco customers sampled the same product actually sold in the Costco store. *Id.* It would reduce waste, because the product vendor could rely on Warehouse Demo to

obtain only the amount of product samples as necessary. *Id.* This system of furnishing product samples logically help the product vendors provide the samples at a minimal cost.

ii. RCW 82.04.290(2)(b) is a tax-imposing section, not an exemption.

The Department routinely describes RCW 82.04.290(2)(b) as an "exemption" throughout its opening brief.[3] However, RCW 82.04.290(2)(b) is *not* an exemption; rather, it is a tax-imposing section that describes the terms and conditions under which the state may subject the taxpayer to tax under RCW 82.04.290(2)(b). This is an important distinction, because, under the prevailing rules of statutory construction, tax-imposing sections should be liberally construed *against* the imposition of tax. By contrast, exemptions should be fairly construed in favor of the tax.

RCW 82.04.290(2)(b) limits the application of RCW 82.04.290(1) by determining how the tax will be imposed and it excludes the value of sample products from the gross receipts tax measure. It is what guides the court to determine what is taxable in the first instance, not what is exempt from the tax. In a tax-imposing section, the taxpayer is *never* subject to the tax if the tax-imposing section does not include the activity as taxable. In the case of an exemption, the activity is subject to tax, but the legislature has chosen to make an exception to taxation. When the

[3] For example, see Br. of Appellant, 14.

legislature exempts activities from tax, it expressly enacts a specific statutory exemption.[4]

The Department asks this court to narrowly construe exemptions against the taxpayer. Br. of Appellant at 20. The court should not inadvertently resort to the statutory construction rules that apply to exemptions. Rather, if a tax-imposing statute is ambiguous, taxpayers "would be entitled to the general presumption that ambiguous tax statutes must be construed in favor of the taxpayer." *Agrilink*, *supra*, citing to *Ski Acres, Inc. v. Kittitas County,* 118 Wash.2d 852, 857, 827 P.2d 1000 (1992).

iii. RCW 82.04.290(2)(b) is clear on its face.

The parties "agree" that the statute is clear on its face. Warehouse Demo, the superior court and the BTA agree on the plain meaning of the words provide. "Furnish" is a broad term and includes the receipt of samples beyond "in-kind" receipts. AR 019 (COL 13, 13.1, 13.2 and 13.3); VRP at 32. The superior court said:

> "... the term "furnish" is a broader term than provided and it can include a number of things including purchases or provide..."

VRP at 32.[5] Thus, for purposes of RCW 82.04.290(2)(b), it made no legal difference whether the vendors provided the samples in-kind or arranged

---

[4] For example, see RCW 82.04.310-.427; RCW 82.04.4289; and RCW 82.04.600-.756.

for repayment of sample purchases by Warehouse Demo. The BTA saw nothing that prescribed "how" the product vendors had to provide the samples. AR 019 (COL 13.2).

The Department disagrees, first contending that RCW 82.04.290(2)(b) use of the term "value" excludes cash payments. Br. of Appellant at 15-20. The Department explains that value is different from cash transactions. Referring to code sections (RCW 82.04.4266, RCW 82.04.4268 and RCW 82.04.4269) and their use of "value" avoiding the concept of "amounts received", the Department contends that the legislature intended to draw a line between value and cash.

As explained above, RCW 82.04.290(2)(b) is not an exemption, so those sections are not as helpful as the Department suggests. Actually looking to the statute that imposes the service B&O tax, it imposes tax on "gross proceeds of sale." RCW 82.04.290(1). Gross proceeds of sale means "the value proceeding or accruing". RCW 82.04.090 expressly defines "value proceeding or accruing" as

> "Value proceeding or accruing" means the consideration, whether money… or other property expressed in terms of money …

Also, in RCW 82.04.220(1) says:

---

[5] Judge Tabor thought that term was so obvious and easily understood, that there was no reason for Warehouse Demo to brief dictionary definitions of the term in its briefing (see CP at 87-88). VRP at 32.

> There is levied and collected … a tax for the act or privilege of engaging in business activities. The tax is measured by the application of rates against *value of products, gross proceeds of sales, or gross income of the business*, as the case may be."

These provisions related to the tax measure are helpful because

> [w]hen possible, the court derives legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wash.2d 1, 9–10, 43 P.3d 4 (2002).

Cashmere Valley Bank v. State, Dep't of Revenue, 181 Wn.2d 622, 631, 334 P.3d 1100, 1104 (2014). Looking at related provisions --- like the measure of the tax under RCW 82.04.290 and the statutory scheme as a whole that imposes tax, the court should look to the provision of the statute that determines the tax measure. In this case, "value" means the same thing as money (cash). Applying that meaning to RCW 82.04.290(2)(b), there is more than ample support for equating cash with value.

The Department agrees with Warehouse Demo that the tax is measure is quite broad and includes most gross receipts. Br. of Appellant at 19. The parties differ as to whether value is limited and narrowly construed in the way that exemptions are narrowly construed.[6] Resorting

[6] Warehouse Demo anticipates that the Department might reply that an exception in a tax-imposing section should be construed with the narrow

to words used in exemption sections to interpret the meaning of "value" is misplaced and will unreasonably add words to a tax-imposing section. A plain reading should use the words used by the legislature in RCW 82.04.290(1) and (2) as well as the related statutory terms related to the tax measure. This is precisely what the BTA did when it refused to adopt the Department's approach. AR 019 (COL 13.3).

The Department further contends that the product samples were not "furnished" because they were purchased by Warehouse Demo. Br. of Appellant at 20-21. The Department argues that "furnished to an agent by his or her principal or supplier" cannot be read to mean "purchased by the agent from his or her principal or supplier." *Id.* at 21.

---

construction rules that apply to exemptions. However, the Washington Supreme Court rejected that notion in *Agrilink*. By way of background, this court noted in footnote 5 of its unpublished opinion that the preferential tax-imposing section is the same as an exemption, because the legislature defines tax preferences as an "exemption." The Supreme Court rejected that conclusion writing: "[a]lthough not essential to our holding, we note that, were we to conclude that RCW 82.04.260(4) is ambiguous, Agrilink would be entitled to the general presumption that ambiguous tax statutes must be construed in favor of the taxpayer. *Ski Acres,* 118 Wash.2d at 857, 827 P.2d 1000. ... However, we need not address DOR's statutory construction arguments because RCW 82.04.260(4) is not ambiguous." *Agrilink Foods, Inc. v. State, Dep't of Revenue*, 153 Wn.2d 392, 399, 103 P.3d 1226, 1230 (2005). Thus, even if a tax-imposing section shows some preferential taxpayer treatment, that fact does not change the rule that ambiguous tax-imposing sections are construed against the tax.

The Department cites to a dictionary definition of "furnished" as "provided with essentials." Br. of Appellant at 22. The Department's logic does not preclude that a purchase and repayment arrangement could be the within providing the samples. As pointed out above, neither the BTA nor the superior court found the term as restrictive as the Department. As Warehouse Demo pointed out in its brief to the superior court, "to provide" means "to make something available." CP 87-88. Clearly, this arrangement by Costco, Warehouse Demo and the product vendors to allow for product samples to be removed from Costco inventory was making the product samples "available."

The Department's argument is based on the premise that "furnished" and "purchased" are mutually exclusive terms. They are not. As Judge Tabor concluded, the arrangement for purchase and repayment is within the broader concept of "furnished" and a more restrictive meaning was not warranted VRP at 31-32.

As further support for its logic, the Department notes that when a demonstrator receives product samples in-kind, the statute would treat that as gross receipts. Br. of Appellant at 23. However, the Department observes, when Warehouse Demo purchases the samples, Warehouse Demo has no gross receipts when it expends funds. This is true; one does not receive gross receipts when that person actually expends money. But

the issue is not whether the payment for goods is a gross receipt; rather the issue is whether the repayment is gross receipts. It should make no difference whether Warehouse Demo is provided a product samples in-kind or it is provided a product sample under an arrangement that allows for repayment of the cost. As Warehouse Demo argued and the BTA and the superior court agreed, the purchase and repayment was the system that the parties agreed would be the way to provide the product samples. This was the mechanism the parties used to furnish product samples for product demonstration.

iv. Summary Conclusion

The BTA did not err when it concluded that "furnished" can include in-kind and purchase/repayment methods for purposes of RCW 82.04.290(2)(b). As the Department agrees, when viewing the statute, the court may consider "the consequences of adopting one interpretation over another (citing to *Burns v. Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). Br. of Appellant at 14. The consequence of interpreting the statute as the Department proposes, the single business activity of demonstrating products pays a higher or lower tax on that activity, depending upon the way that the product vendors furnish the product sample. The BTA and superior court interpret the statute so the

consequence is that a single business activity bears the same tax burden regardless of the way the product vendors furnish the sample products.

c. The BTA and Superior Court Had Ample Factual Support that Warehouse Demo Acted as an Agent.

i. Relevant Factual Background Related to Whether Warehouse Demo Received the Furnished Product Samples as an Agent.

Under the Costco agreement, Warehouse Demo's role was a liaison among Costco buyers, Costco and the product vendors. AR 147 (Section 1.G.(i)); AR 026; AR 146. Furthermore, the agreement stated that Warehouse Demo wishes to perform, and shall perform, demos at Costco warehouse locations on *behalf* of Costco vendors. AR 146 (Section C.). The purpose of Warehouse Demo's services was to "increase the sales for Costco and Costco vendors, just move product." Tr. at 26.

Warehouse Demo's website provides customer quotes to show the effect of Warehouse Demo's services. *See* AR 623 – 634. For example, one customer stated "[d]emos definitely add to the shopping experience and we often see sales increase significantly. The Warehouse Demo office team is great to work with and are accommodating in making sure our needs are met and that demos run smoothly." AR 631. Another customer added "[Warehouse Demo] is our biggest marketing tool for our seasoning and other products." AR 633. And, as a final example, another customer

stated "[w]e promote all our products through demos. Warehouse Demo has been very responsive in working with us to find additional ways that we can continually boost the effectiveness of our demo program." AR 627-628. When asked by the Department how a demonstrator would prepare a sausage patty, Warehouse Demo responded that Warehouse Demo conducted the demonstrations pursuant to the product vendor's demo instructions. Tr. at 58.

However, while it is clear that Warehouse Demo was hired by vendors to drive sales of product, Warehouse Demo's fees were not contingent on sales of vendors' products, but simply on the amount of time spent demonstrating the products. AR 146 (Section C); AR 026 (FOF 5.2). Ultimately, as Mr. Ellis testified, Warehouse Demo "supplied the labor and marketing know-how to execute product demonstrations." Tr. at 27.

To run the demonstrations, Warehouse Demo occupied Costco floor space that was rented by the product vendors from Costco. Tr. at 24; AR 026; AR 149 (FOF 3.2). Product vendors contacted Warehouse Demo directly to schedule Warehouse Demo's service. Tr. at 24; AR 026 (FOF 4). Costco typically wanted vendors and Warehouse Demo to execute demonstrations across a region; in the Northwest that was 65-70 locations. Tr. at 25. At the conclusion of a demonstration, unused products in

salable condition were returned to Costco for a credit, and unsalable products were disposed of according to Costco's food-disposition policies. Tr. at 29-30; AR 027 (FOF 8).

ii. Contrary to the Department's Contention, the Record Contains Substantial Evidence that Warehouse Demo Acted as Agent of the Product Vendors.

The Costco agreement did not expressly establish Warehouse Demo as the agent of the product vendors. Warehouse Demo had no written agreement with the product vendors expressly appointing Warehouse Demo as an agent. Finally, Warehouse Demo stated that it was not an agent for purposes of Rule 111. However, those factors alone do not prove an absence of agency.

The BTA considered the entire record, and it concluded that Warehouse Demo acted as the product vendors' agent. Facts in the record support the existence of agency. In the Costco agreement, it provides that Warehouse Demo would act on *behalf* of the product vendors. Warehouse Demo explained that its purpose was to improve sales for Costco and the product vendors. The record includes testimonials from the product vendors speaking to the Warehouse Demo's effectiveness that increased sales of their products. Warehouse Demo explains that it prepared perishable foods pursuant to the product vendor's preparation instructions.

The product vendors contacted Warehouse Demo to demonstrate their products.

Is there substantial evidence to support the BTA's conclusion? The judicial standard for this court is to review the facts and circumstances and then conclude whether such evidence would persuade a fair-minded person that the findings of facts are true:

> We review the findings of fact in Skagit Valley's case under the substantial evidence standard of RCW 34.05.570(3)(e). We uphold findings supported by *evidence sufficient to persuade a fair-minded person* of the declared premise's truth. Heinmiller v. Dep't of Health, 127 Wash.2d 595, 607, 903 P.2d 433, 909 P.2d 1294 (1995), cert. denied,518 U.S. 1006, 116 S.Ct. 2526, 135 L.Ed.2d 1051 (1996). *We view the evidence in the light most favorable to the party who prevailed in the administrative forum.* City of Univ. Place v. McGuire, 144 Wash.2d 640, 652, 30 P.3d 453 (2001). Accordingly, we accept the fact finder's determinations of the weight given to reasonable but competing inferences. McGuire, 144 Wash.2d at 652, 30 P.3d 453;Sec. Pac. Bank, 109 Wash.App. at 803, 38 P.3d 354.

Skagit County Pub. Hosp. Dist. No. 1 v. Dept. of Revenue, 158 Wn.App. 426, 242 P.3d 909 (2010).

The facts are viewed "in the light most favorable to the party who prevailed in the administrative forum." Second, this court must be satisfied that the evidence is sufficient to persuade a "fair-minded" person that facts are true.

The Department contends that there is no evidence that an agency exists. To the contrary, there is evidence that Warehouse Demo acted as

the product vendors' agent. Most telling of this relationship was the product vendors' testimonials praising how Warehouse Demo's demonstration of their products increased their sales.

To determine if the facts establish an agency, our courts have laid down principles that we follow. "Agent" is defined as "a person who does business for another person; a person who acts on behalf of another."[7] An agency relationship generally arises when two parties consent that one shall act under the control of the other." *Rho Company Inc.* v. *Department of Revenue*, 113 Wn.2d 661, 570, 782 P.2d 986 (1989). Consent may be implied. Rho, 113 Wn.2d at 570, 782 P.2d 986. The requirement that the principal must exercise control over the agent, *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 941, 845 P.2d 1331 (1993), means that there must be facts or circumstances that "establish that one person is acting at the instance of and in some material degree under the direction and control of the other," *Matsumura v. Eilert,* 74 Wn.2d 362, 368–69, 444 P.2d 806 (1968). *Washington Imaging Services, LLC* v. *Department of Revenue*, 171 Wn. 2d 548, 562, 252 P.3d 885, 892 (2011).

How do the facts and circumstances stack-up under these principles? The Costco agreement explicitly states that Warehouse Demo

---

[7] "Agent." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 9 Nov. 2016.

shall perform demos at Costco warehouse locations *on behalf of* Costco vendors. AR 146 (Section C.). Moreover, the agreement states that Warehouse Demo was to act as a liaison among Costco buyers and warehouse managers and [the product vendors]. AR 146 (Section C.); AR 26 (FOF 3.1). While this was under a contract between Warehouse Demo and Costco, it clearly contemplates a relationship between Warehouse Demo and Costco vendors. That is, Warehouse Demo acts on behalf of Costco vendors to the promote vendor products to Costco customers. Vendor customer testimonials provide evidence to support this fact:

> "[d]emos definitely add to the shopping experience and we often see sales increase significantly. The Warehouse Demo office team is great to work with and are accommodating in making sure our needs are met and that demos run smoothly"; "[Warehouse Demo] is our biggest marketing tool for our seasoning and other products"; "We promote all our products through demos. Warehouse Demo has been very responsive in working with us to find additional ways that we can continually boost the effectiveness of our demo program.

AR 627-633.

Not only did Warehouse Demo agree to act on behalf of its vendor customers, the facts and circumstances in the record show that Warehouse Demo acted under the direction and control of its vendor customers. To schedule demonstration services, vendors would contact Warehouse Demo

directly, would instruct Warehouse Demo on the location(s) in which it would perform these services and the duration of the event. Tr. at 23 and 25: AR 026 (FOF 4). Warehouse Demo performed its demonstration services in space rented by its customers. AR 149 (Section 4); AR 026 (FOF 3.2). Moreover, Warehouse Demo performed its services pursuant to the vendor's demo instructions. Tr. at 58. Demonstrations involved preparing vendor products, heating or cooking when necessary, and handing out sample sized portions to Costco members. AR 576; AR 027 (FOF 6.2). Along with passing out samples, demonstrators shared product information with Costco members, both through verbal presentations and from time to time by handing out vendor material such as pamphlets or flyers. AR 576; AR 026-027 (FOF 6.1). These materials were provided directly to Warehouse Demo from its vendor customers. Tr. at 31; AR 027; FOF 6.1. In order to effectively perform its services, Warehouse Demo necessarily had to act as an instrument of the product vendors to make sure the products were presented in line with the product vendors' instructions.

The Department agrees that an agency is created by the parties' behavior and not necessarily by a written agreement. Br. of Appellant, 27. It is well understood that an agency can be implied, if the facts so warrant, not only if the contracts are silent as to agency, but <u>even if the parties execute contracts expressly disavowing the creation of an agency relationship</u>. *Rho*, 113 Wn.2d at 571; See *Fernander v.Thigpen*, 278 S.C.

140, 143, 293 S.E.2d 424 (1982) (emphasis added). Additionally, even if the parties may not have established an expressed agency through a written contract, the parties' actions and conduct, as described above, can create an implied agency. An implied agency is given the same status as an explicit agency, to wit:

> Through their actions, conduct and words, the parties may bring into existence an implied agency, despite their intention that this not come to pass. But, being implied in either law or fact, it is no less a true agency and carries with it all of the legal responsibilities arising from an agency created by explicit agreement. *Turnbull v. Shelton,* 47 Wash.2d 70, 286 P.2d 676; *Freeman v. Navarre,* 47 Wash.2d 760, 289 P.2d 1015.

Busk v. Hoard, 65 Wn.2d 126, 134, 396 P.2d 171, 175 (1964). In *Busk*, the agreement between the alleged principal and agent "categorically denied the existence of any agency relationship between them." *Busk v. Hoard*, 65 Wn.2d at 128. Yet, the court reviewed the totality of the facts and circumstances, applied the test quoted above, and found an agency to exist.

iii. Contrary to the Department's Contention, the Product Vendors Exercised Control Over Warehouse Demo.

As the Department points out, control over the agent is an important consideration. Br. of Appellant at 27. However, the

Department contends that Warehouse Demo was merely an independent contractor. *Id.* The Department relies on the Costco agreement, hiring Warehouse Demo "to do a job." *Id.* It notes that Warehouse Demo testified that it "exercised control over the demonstration performed." Br. of Appellant at 29. While Warehouse Demo is right, it did control the demonstration, the truth is that it only partially did so. It is not possible to know from the record what the witness actually thought, but there is additional observable evidence that control also extended to the product vendors.

The Department's analysis overlooks other parts of the record that demonstrate the product vendors' control. While the product vendors may not have been onsite supervising each demonstrator, they did exercise control over the demonstration of the product. For example, Warehouse Demo did not independently choose when or what products to demonstrate. After Costco made the initial contact with companies like General Mills, additional jobs were facilitated by both Costco and "the relationship that our sales people had with the companies." Tr. at 24. When the product vendors wanted products demonstrated, they interacted with Warehouse Demo. *Id.* The product vendors would schedule demonstrations at Costco locations with Warehouse Demo. Tr. at 24; AR 026 (FOF 4). This is evidence of control.

Further, when Warehouse Demo prepared the products for demonstration, it did not independently decide how to prepare the foods. Warehouse Demo followed the instructions provided by the product vendors.[8] Tr. at 58. This is evidence of control.

A testimonial from Kellogg provides that the "WDS office team is great to work with and are accommodating in making sure our needs are met…". AR 623-624. Valley Fine Foods says that "WDS has been very responsive in working with us…". AR 627. These testimonials support that product vendors consult with what WDS is doing on their behalf.

Finally, Warehouse Demo did not independently decide what to say about a product vendor's products. Along with passing out samples, demonstrators shared product information with Costco members, both through verbal presentations and from time to time by handing out vendor material such as pamphlets or flyers. AR 576; AR 026-027 (FOF 6.1). Again, this is evidence of control.

Consequently, the product vendor may not have controlled all aspects of Warehouse Demo's services, but they did control certain critical aspects of Warehouse Demos functions that were performed on behalf of

---

[8] This is not an unusual requirement. One could speculate that a product vendor would want such control as a prudent business practice to minimize product liability risks.

the product vendors. There is more than sufficient evidence for the BTA to have found agency as a matter of law. AR 020 (COL 14.3).

iv. Contrary to the Department's Contention, the BTA's Finding That Warehouse Demo Acted as Agent Is Supported by Substantial Evidence.

The Department contends that there is no evidence that supports the BTA Conclusion of Law, 14.3. Br. of Appellant at 30. It relies on the evidence that Warehouse Demo was not an agent for purposes of advances and reimbursements under Rule 111.[9] Even though Warehouse Demo may not have been an agent for Rule 111 purposes, that does not prevent Warehouse Demo from being an agent for purposes of RCW

---

[9] Warehouse Demo points out that Rule 111 is an administrative rule that is not apparently based on a particular statute. It appears to be an administrative solution that recognizes that in some cases, funds pass through a taxpayer and should be taxable to the recipient because it is received as an agent. The Department has embellished on the meaning of agent for purposes of Rule 111, that it is very difficult for taxpayers to meet the Department's meaning of agent. The Department's counsel agrees, stating that "It's hard to meet the requirements of Rule 111." BTA Tr., 88. Rule 111 is not at issue in this case, but the court should not borrow agency concepts for its analysis as the Department has administratively narrowed the meaning of agency. One should wonder if Rule 111 might actually be legally suspect to the extent that it administratively alters the common law meaning of agency. This court would not allow the Department to change the common law meaning of "lease," observing that the Department "categorically declared all leases with a particular characteristic not to be leases." *Duncan Crane Serv., Inc. v. State Dep't of Revenue*, 44 Wn. App. 684, 689, 723 P.2d 480, 483 (1986). The court struck down the rule.

82.04.290(2)(b). The Department has no rule that applies to agency for purposes of RCW 82.04.290(2)(b). Thus, the BTA properly applied the common law agency rules as explained by *Matsumura, supra*. AR 020 (COL 4.2).

As described above, viewing the evidence in a light most favorable to Warehouse Demo, the prevailing party at the BTA, the record contains parts of an agreement that refer to Warehouse Demo acting on behalf of the product vendors. The product vendors submitted testimonials that Warehouse Demo presented their products to the Costco customers. The product vendors contacted Warehouse Demo to present their products at Costco locations. Thus, there is evidence that Warehouse Demo and the product vendors had a relationship.

Second, Warehouse Demo did not work in a vacuum. Warehouse Demo performed demonstration services at times and Costco locations determined in part by the product vendors. The product vendors provided Warehouse Demo with the information about the demonstrated products. The product vendors provided Warehouse Demo with pamphlets about the products to distribute to Costco customers. The product vendors provided instructions on the preparation of the samples. The product vendors interacted with Warehouse Demo with respect to the demonstrations.

Clearly, there is evidence that the product vendors had control over Warehouse Demo.

v. Contrary to the Department's Contention, the Department *Itself* Does Not Require the Proof It Demands Here to Prove Agency.

The Department challenges the BTA conclusion that there is not enough evidence to support agency status. For example, in Det. No. 86-303, 2 WTD 43 (1986) (CP 123-132), the Department reviewed whether an affiliate was acting as agent. The Department did not contest the taxpayer's fact statement that it was an out-of-state company that had no presence in Washington (which would mean no agents in the state). The auditor had looked at the activities of the parent and the various affiliates and concluded that the taxpayer had nexus because of those parent's instate activities. It found that the parent and other affiliates were "agents" of the out-of-state taxpayer. There was no finding of an agency agreement or a taxpayer admission of an agency as the Department insists that the BTA must have in the record to support agency, yet the Department considered the totality of the facts and circumstances, concluding:

> Certainly the evidence supports finding that [the franchisor company or parent] served as the *taxpayer's agent* in processing the [product] orders at issue. The purchase invoices and order forms are printed with [the franchise's] name and logo and the order forms state they are to be sent to the

> [parent company]. Although these activities took place out of state, we believe the evidence supports our finding the parent's or affiliate's instate activities established the market for the Washington sales.

Id. at page 48 (italics supplied).

Thus, if nothing else, the Department must pick a perspective and stick with it. Either the totality of the facts and circumstances determine whether an agency exists, or the agreements and parties' statements bind the Department and parties. Like the facts in 2 WTD 43, Warehouse Demo was conducting activity in Washington to help the Costco vendors establish a market in Washington for their products. Based on 2 WTD 43, Warehouse Demo would be viewed as the vendors' agent.

In a more recent determination, Det. No. 10-0057, 30 WTD 82 (CP 134-140), the Department again viewed the totality of the facts and circumstances to conclude the cross-selling synergies of various instate and out-of-state entities were sufficient to find that the instate affiliate was the representative of the out-of-state representative. Quoting from the Department, it explains why a written agreement is unnecessary:

> The taxpayer also argues that [taxpayer's sister company] buys the catalogs from the parent and therefore is a customer of the taxpayer rather than an agent. The creation of an agency or representative relationship can be implied based on conduct, circumstances, or ratification. Recently, in *Borders Online, LLC v. State Bd. of Equalization*, 129 Cal. App. 4th 1179, 29 Cal. Rptr.3d 176 (Cal. App. 2005), the

> California Court of Appeals held that Borders retail stores in California (Borders) were engaged in selling property as authorized representatives of Borders Online (Online), an out-of-state internet retailer, and therefore established nexus for Online. *While there was no written agreement between Borders and Online evidencing an agency or representative relationship, the court found that such agreement was implied*, reasoning, in part: "Online announced on its website that Borders was authorized to accept Online's merchandise for return, or that Borders would provide customers with an exchange, store credit, or a credit card credit. By accepting Online's merchandise for return, Borders acted on behalf of Online as its agent or representative in California." *Id.* at 1190.

Id. at 87-88 (italics supplied.).

The conclusion should be no different here. Warehouse Demo demonstrators distributed signs, pictures, nutritional information, and other product information to potential buyers of the vendors' goods. Such activity helped these vendors establish or maintain a market for their products sold in Costco's Washington stores. As one product vendor said in its testimonial: "WDS demonstrators do a good job of calling out [the products] nutritional and brand benefits." AR 629. See Appendix B. The Department, in 30 WTD 82, found such activity "evidenced an agency."

As a matter of tax policy, taxpayers are entitled to a consistent interpretation of what constitutes an agent. If the court agreed with the Department, based on this record, taxpayers would be faced with a

meaning of "agent" for Rule 111, another set of rules to determine agent for nexus purposes and nexus rules for RCW 82.04.290(2)(b) that are inapposite for nexus purposes.

vi. Summary Conclusion

The BTA did not err when it concluded that Warehouse Demo was an agent for purposes of RCW 82.04.290(2)(b).

d. The Parties Both Assert That RCW 82.04.290(2)(b) Is Unambiguous and Not In Need of Interpretation; However, Because Both Parties Reach Different Interpretations, Warehouse Demo Recognizes That This Court Might Conclude That the Statute Is Ambiguous.

i. Relevant Factual Background Related Resolving Any Ambiguity in RCW 82.04.290(2)(b).

Warehouse has previously discussed *Agrilink* in Section IV.A. above and the principles behind statutory construction. Statutory construction construes tax-imposing sections against the application of the tax. When dealing with an ambiguous statute, the courts may look to legislative history. *State v. Evans*, 177 Wn.2d 186, 298 P.3d 724 (2013). As the state points out, there is not much legislative history. CP 39. The limited history was a comment from Senator Gallagher in Senate Journal, 38th Leg., Ex. Sess.:

> The undersigned Senator voted "nay" on Engrossed Senate Bill No. 54 because it was clearly stated on the floor of the Senate that the purpose of section 2 amending RCW

> 84.04.290 [sic] was to permit distillery representatives the right to deduct the value of samples purchased by them in furtherance of their business. I have no objection to such deductions but feel that the exemption more properly belongs in another section of the law. I do not question the legality of such amendment since the legislature has clearly stated its position on this matter.
>
> Michael J. Gallagher

Id. at 205.

From this bit of history, this court can see what this senator understood demonstrators would be including in the measure of the tax: "permit distillery representatives the right to deduct the value of samples purchased by them in furtherance of their business." Senator Gallagher did not mention repayments. As the Department points out, purchases are not part of the demonstrators gross income. Br. of Appellant at 23. The most logical way to read this statement would be if the distillery repaid the representatives for the samples that they purchased.

Thus, the scant history points more to the interpretation posed by Warehouse Demo than to the interpretation posed by the Department. Because tax-imposing sections are construed against the tax, this court should affirm the BTA decision.

ii. Summary Conclusion

If the statute is found to be ambiguous, then this court can consider legislative history. The only history that would assist the court is Senator

Gallagher's statement that supports the BTA's conclusion, not the Department's conclusion.

V. CONCLUSION

The Department challenges the BTA's interpretation of RCW 82.04.290(2)(b) because it argues that a plain reading of the statute does not support the interpretation that "furnish" of product samples includes an arrangement whereby the parties agree that Warehouse Demo can purchase the samples and be repaid for them by the product vendors. The term "furnish" simply is not that restrictive and is sufficiently broad to include both sample products provided in-kind or through a purchase and repayment arrangement. When construing a tax-imposing statute, it should be viewed broadly against imposition of the tax. When viewing the statute as a whole, the BTA interpretation does not demonstrators differently solely based on the method the parties chose to provide the product samples. Neither the BTA nor the superior court erred.

The Department also challenges the BTA interpretation of the facts that demonstrated that Warehouse Demo functioned as an agent. Contrary to the Department's statement that there are no facts that support an agency, there are several facts that could a fair-minded person to the reasonable conclusion that Warehouse Demo was an agent. Oddly, the position the Department has taken in this case with respect to what needs

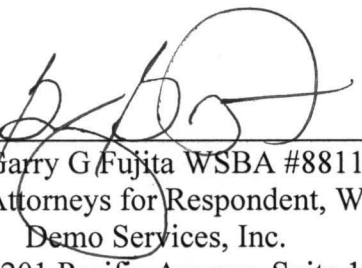
to be proved to establish an agency is contrary to the Department's administrative decisions with respect to agency for purposes of nexus. An agent is an agent for common law purposes and the Department should not be able to declare similar facts to establish agency for nexus purposes but not agency for purposes of RCW 82.04.290(2)(b). Neither the BTA nor the superior court erred.

Finally, if this court concludes that RCW 82.04.290(2)(b) is ambiguous, then the principles of statutory construction requires the court to construe ambiguous tax-imposing taxes against the state. Here, though the legislative history is scarce, the evidence would more likely lead to the conclusion that the repayment was contemplated to be excluded from tax then it was that the statute was making subtle and discrete distinctions based on "value" to exclude cash repayments. Should the court find the statute ambiguous, Warehouse Demo urges the court to apply these principles and facts to conclude that it does not matter if the product samples were provided in-kind or through a purchase and repayment method.

The BTA order should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of June, 2017.

EISENHOWER CARLSON PLLC

By: 

Garry G Fujita WSBA #8811
Attorneys for Respondent, Warehouse Demo Services, Inc.
1201 Pacific Avenue, Suite 1200
Tacoma, Washington 98402
gfujita@eisenhowerlaw.com
Telephone: (253) 572-4500
Facsimile: (253) 272-5732

Make sure to add piece about the reasonableness of the interpretations.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document, via email, on the following:

Charles Zalesky
Assistant Attorney General
Office of the Attorney General
P.O. Box 10123
Olympia, WA 98504-0123
ChuckZ@atg.wa.gov
CandyZ@atg.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of June, 2017, at Tacoma, WA.

Cindy Rochelle

Cindy Rochelle, Legal Assistant